NO. 50858-3-II

COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

SHEILA LAROSE,

Appellant,

vs.

KING COUNTY, WASHINGTON, and PUBLIC DEFENDER ASSOCIATION AKA THE DEFENDER ASSOCIATION (PDA),

Respondents.

BRIEF OF RESPONDENT PUBLIC DEFENDER ASSOCIATION

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS

Page

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES

Page

TABLE OF AUTHORITIES

Page

Statutes

Other Authorities

TABLE OF AUTHORITIES

Page

I. INTRODUCTION

The Superior Court properly resolved the claims of Appellant Sheila LaRose (hereafter "LaRose") short of trial because they lack merit under the law. LaRose, a former public defender, claims that she developed post-traumatic stress disorder ("PTSD") as a result of one of her clients harassing and then stalking her. She sued her former employers, Public Defender Association ("PDA") and King County, for that workplace injury.

LaRose tried to make her claim fit within a number of legal theories. She did not succeed. The Superior Court correctly dismissed pursuant to Civil Rule 12(b)(6) LaRose's Washington Law Against Discrimination ("WLAD"), Ch. 49 RCW, claim against PDA for an alleged hostile work environment. The Supreme Court's decision *DeWater v. State*[1] establishes that imputation of harassment to an employer is a necessary element of a hostile work environment claim. This element relies on agency and vicarious liability principles and requires evidence that the harasser was an employee or an independent contractor subject to the employer's control. It is undisputed that LaRose's harasser was neither.

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[1] *DeWater v. State*, 130 Wn.2d 128, 921 P.2d 1059 (1996).

In addition, the decision can be affirmed on the alternative basis that LaRose did not allege, and the record does not establish, the occurrence of facts during the time she was employed by PDA (2009 until June 30, 2013) sufficient to meet her burden of establishing the elements of a hostile work environment claim.

The Superior Court also correctly dismissed pursuant to Civil Rule 12(b)(6) LaRose's disability discrimination claim against PDA because LaRose failed to allege, and the record does not contain, sufficient facts to establish the essential elements of that claim against PDA. LaRose never reported a disability to or requested an accommodation from PDA.

Finally, this Court also should affirm dismissal on summary judgment of LaRose's alternative theories of tort liability alleging workplace injury. The Superior Court correctly dismissed those claims pursuant to Civil Rule 56. The exclusive remedy provision of Washington's Industrial Insurance Act (IIA), Ch. 51.04 RCW, bars her tort claims. Her negligence claims against PDA also fail as a matter of law for insufficient evidence of breach and causation. No evidence shows that PDA deliberately intended to injure LaRose.

All LaRose's requests for reversal should be denied.

II. ISSUES ON APPEAL

1. Did the Superior Court correctly determine that LaRose failed to state a claim under RCW 49.60.180(3) for hostile work environment because, as the Washington State Supreme Court held in *DeWater v. State*, imputation of the alleged harassment to the employer requires that the harasser be an employee or an independent contractor subject to the employer's control, and the harasser undisputedly was neither?

2. Alternatively, did LaRose fail to allege facts sufficient to meet her burden to establish at least two elements of a hostile work environment claim—imputation of liability and sufficiently pervasive and hostile acts to alter the terms of employment—during her employment by PDA, which ended on June 30, 2013?

3. Did the Superior Court correctly hold that the Industrial Insurance Act bars LaRose's tort claims because she asserts as her injury PTSD, an injury necessarily covered by the IIA because it arises from trauma experienced on the job?

4. Alternatively, did the Superior Court correctly dismiss LaRose's negligence claims when the evidence of record is insufficient to meet her burden of establishing two essential elements—breach and causation—against PDA?

5. Did the Superior Court correctly dismiss LaRose's intentional injury claim for lack of a material question of fact when the facts of record are insufficient to support such a claim?

6. Did the Superior Court correctly dismiss LaRose's disability discrimination claim against PDA when she failed to allege, and the record does not contain, facts to establish the essential elements of such a claim against PDA?

III. STATEMENT OF THE CASE[2]

The Court's evaluation of this appeal must turn on the record and not LaRose's characterizations of that record. LaRose takes great liberties with the record and witness testimony and relies on inaccurate characterizations, exaggeration and hyperbole in an attempt to improve claims and advance issues that are not factually supported. LaRose's version of events is flatly false in several respects, including those identified in the brief of King County. The allegations and facts actually in the record do not support her claims.

[2] PDA incorporates by reference the Statement of the Case in the brief of King County. Facts pertinent to PDA are highlighted here.

A. PDA and King County are distinct entities that employed LaRose at different times; this Court must consider each separately.

PDA is a non-profit corporation advocating to reform the criminal justice system. CP 1956. PDA is not and was not "an arm, agent [or] agency of King County," with the exception of its former employees' eligibility for the PERS state retirement system. CP 1957. From 1969 to June 30, 2013, PDA operated as "The Defender Association" or "TDA," serving as an integrated non-profit law firm providing public defense services to King County and the City of Seattle. CP 1957. King County ended its contract with TDA effective July 1, 2013, and began administering its public defense program through the County. *Id*. Since July 1, 2013, PDA no longer operates as a public defense law firm. *Id*.

B. The events during LaRose's employment at PDA from 2009 to June 30, 2013 do not give rise to an action against PDA.

LaRose's briefing blurs together the two respondents. PDA employed LaRose as a public defender attorney from 2009 to June 30, 2013, and the County employed her thereafter. *Id*. LaRose's allegations against PDA are not coextensive with those against the County.

LaRose was a member of Service Employees International

Union Local 925. CP 1958. Her Collective Bargaining Agreement with PDA contained a provision prohibiting discriminatory practices and honoring employee case assignment preferences, stating, "Insofar as employee preferences may be honored consistent with the needs of the office, they will be." CP 1980 ¶ 13.1.

LaRose worked for PDA in the Involuntary Treatment Court, representing clients experiencing acute mental illness, CP 168-71, the Kent domestic violence division, representing mostly men accused of violent behavior toward women, CP 172-74, and then in the felony division. CP 174. This case concerns her work in the felony division, where she met daily with her supervisors—Benjamin Goldsmith, Leo Hamaji and Daron Morris—to obtain advice about her cases and discuss any difficulties. CP 175-76.[3]

On October 31, 2012, LaRose received an assignment to represent Mr. Smith against a charge of stalking. CP 188-89.[4] She represented Mr. Smith without incident until the last week of March 2013, when she alleges she received a call from Mr. Smith in which

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[3] On July 1, 2013, LaRose became an employee of King County along with Mr. Goldsmith, Mr. Hamaji, Mr. Morris, and other PDA employees. CP 416; 1957 ¶ 8.

[4] "Mr. Smith" is an alias for the name of the client. He is also sometimes referred to as "Client A" by LaRose and in deposition testimony in this case.

he said words to the effect of "I love you" and "I want to marry you." CP 236.[5] LaRose considered those statements to be inappropriate and told Mr. Smith so. CP 237. LaRose contends that she subsequently began receiving more calls and voicemails like this from Mr. Smith. CP 177. LaRose and Mr. Smith continued to discuss representation-related topics. CP 207; 575-577. LaRose is unable to recall or estimate how many calls or voicemails she received from Mr. Smith during the time she was employed by PDA. CP 232-33.

LaRose testified that in April 2013, she met with one of her supervisors, Mr. Goldsmith, described the calls she had begun receiving from Mr. Smith, and told Mr. Goldsmith she thought she needed to get off the case. CP 177. Mr. Goldsmith said, "Okay." CP 178. LaRose elected to keep the case, however, when within two days she went back to Mr. Goldsmith and said she had changed her mind about getting off the case. CP 198. LaRose told Mr. Goldsmith she "would like to try to finish the case" for Mr. Smith. CP 197-98.

LaRose never again told Mr. Goldsmith she thought she should stop representing Mr. Smith. CP 179-80. She never told

[5] LaRose testified that on March 25, 2013, she had not received any concerning calls from Mr. Smith. CP 234-35.

anyone else at PDA that she thought she should stop representing Mr. Smith. CP 181. LaRose never asked anyone at PDA to assign Mr. Smith's case to another attorney. CP 222.

On or about May 24, 2013, LaRose met with Mr. Goldsmith, Mr. Hamaji, and fellow felony attorney Twyla Carter and showed them a handwritten letter she had received from Mr. Smith that said "I love you" and included drawings of flowers and birds. CP 186. She showed her supervisors and colleague the letter so they could assist her in determining whether the letter should be submitted to the court. CP 190. LaRose did not tell anyone in that meeting that she thought she needed to stop representing Mr. Smith. CP 181. She did not ask that Mr. Smith's case be reassigned. CP 222.

On June 4, 2013, LaRose received more calls from Mr. Smith. CP 191-92. LaRose testified that she likely considered those calls to be inappropriate or harassing in nature. CP 192-93. According to LaRose, "at this point, [she] was getting to the point of being concerned enough to start documenting in the file" that Mr. Smith was making inappropriate calls. *Id*. LaRose never documented any inappropriate or concerning phone calls from Mr. Smith before, and did not do so after. CP 194. LaRose contends that on June 4, 2013, she approached Mr. Hamaji and described to him the nature of the

calls she was receiving from Mr. Smith. *Id*. LaRose did not tell Mr. Hamaji that she thought she needed to stop representing Mr. Smith. CP 181. She did not ask that Mr. Smith's case be reassigned to another attorney. CP 222. According to LaRose, Mr. Hamaji advised her to ignore Mr. Smith's calls. CP 195-96. On June 30, 2013, LaRose's employment at PDA ended. CP 216.

LaRose then became an employee of King County. The County's brief sets forth in more detail the events that occurred during the timeframe in which LaRose was a County employee. This includes receiving more inappropriate calls and continuing to represent Mr. Smith until July 26, 2013 (when she withdrew for a reason unrelated to his calls: a conflict caused by his withdrawal of a plea), CP 1919 ¶ 2.43, being physically stalked by Mr. Smith after he was released from jail in February 2014, CP 182, reporting him to the police and his conviction for stalking her. CP 1923 ¶ 2.54. LaRose was later diagnosed with post-traumatic stress disorder as a result of the harassment and stalking by Mr. Smith. *Id*. ¶ 2.5; CP 243-44.

C. LaRose's client had been represented by female attorneys in the past, none of whom he harassed or stalked.

The case LaRose handled was not Mr. Smith's first. In March 2012, PDA attorney Leona Thomas represented Mr. Smith in a case.

CP 2664. Mr. Smith did not engage in any inappropriate behavior toward Ms. Thomas. *Id*. He did not harass or stalk her. *Id*.

In June 2012, PDA attorney Rebecca Lederer represented Mr. Smith in another case. CP 2667. Mr. Smith left Ms. Lederer one or two voicemails saying that he "loved" her. *Id*. Ms. Lederer told Mr. Smith that such comments were inappropriate and to stop. *Id*. After that, Mr. Smith never made another inappropriate comment to Ms. Lederer of any kind. *Id*.

Nonetheless, Ms. Lederer requested permission to withdraw from representing Mr. Smith, and for his case to be reassigned. CP 2668 ¶ 4. That request was immediately granted by PDA, Ms. Lederer was expressly reassured that it was fine to make such a request, and the case was reassigned to a different attorney, Paul Vernon. *Id*.[6] Mr. Smith never stalked or harassed Ms. Lederer. CP 2668 ¶ 3. Ms. Lederer never perceived that he posed any threat of harm. *Id*. Ms. Lederer never suffered any negative consequences at work as a result of having his case reassigned. *Id*. ¶ 4. Indeed, consistent with the culture at PDA of supporting attorneys' case

[6] Daron Morris told Ms. Lederer, "I will let you make the call" as to whether reassignment was appropriate and then, *when Ms. Lederer asked him to do so*, he immediately reassigned the case. CP 75-76.

assignment preferences and requests to be removed from cases under circumstances that made them uncomfortable or worried, Mr. Morris expressly reassured Ms. Lederer that reassignment was "no problem" and that she shouldn't "think twice about it." CP 76.

LaRose admits there is no evidence that PDA (including the docket clerk that assigned Mr. Smith's case to her or Mr. Goldsmith) knew that Mr. Smith was the same person Ms. Lederer had represented. CP 219, 439:1-24.

D. LaRose acknowledges the harm she suffered was caused by her client.

LaRose acknowledges that her alleged harm was caused by Mr. Smith. For example, she testified: "I have been injured by both the harassment and the stalking of [Mr. Smith]. That is the basis for this suit." CP 215.

E. LaRose acknowledges the harm she suffered was a workplace injury.

LaRose acknowledges that she "was injured at work" and that her injuries are compensable under Washington's workers' compensation statute. CP 208-11. LaRose testified that the harm allegedly caused by the assignment to Mr. Smith's case and failure to remove her from the case (contrary to her express wishes) is that Mr. Smith went on to stalk her, which stalking resulted in her PTSD

and profound depression. CP 222-23.

LaRose's psychiatrist, Dr. Stanley Shyn, opined that she "was properly diagnosed with Post Traumatic Stress Disorder (PTSD), Major Depressive Disorder, and Generalized Anxiety Disorder," which conditions were caused by the "stalking type phone calls to her at work beginning in 2013" (as well as other subsequent traumatic events that occurred after LaRose was no longer employed by PDA). CP 646-47 ¶¶ 13 and 16-17; *see also* CP 659-70 ¶ 2. LaRose's expert and treating psychiatrists opine that each of the traumatic events she reported to them was enough, standing alone, to cause her PTSD. CP 255-58. *See also* CP 246-47.

F. LaRose never filed a workers' compensation claim against PDA.

LaRose filed a workers' compensation claim against King County, but it was denied as untimely. CP 250. LaRose incorrectly designated the injury she suffered as an "occupational disease" when it qualifies as an "industrial injury" compensable under the workers' compensation scheme set forth in the IIA. *Id*. LaRose has never at any time filed a workers' compensation claim against PDA.

IV. ARGUMENT FOR AFFIRMANCE

This Court should uphold the Superior Court's decisions. The Superior Court correctly determined that the allegations and facts

shown do not support LaRose's claims as a matter of law.

A. Standards of Review

This Court reviews *de novo* the dismissal under Rule 12(b)(6) of LaRose's claim of hostile work environment under the WLAD. *Kinney v. Cook*, 159 Wn.2d 837, 842 (2007). Thus, this Court reviews *de novo* LaRose's first Assignment of Error and Issue 1.

This Court also reviews *de novo* the summary judgment under Rule 56 dismissing LaRose's tort claims of negligence and intentional injury. *Rothwell v. Nine Mile Falls Sch. Dist.*, 173 Wn. App. 812, 818 (2013). The reviewing court considers the same evidence presented to the trial court. *Id*., citing *Lybbert v. Grant County*, 141 Wn.2d 29, 34 (2000). Thus, this Court reviews *de novo* LaRose's second Assignment of Error and Issues 2 and 3.

The Superior Court dismissed LaRose's WLAD disability discrimination claim under Rule 12(b)(6) (not under Rule 56 as LaRose contends in her brief). This Court reviews that decision, which is mentioned in LaRose's second Assignment of Error and Issue 3, *de novo*. *Kinney*, 159 Wn.2d at 842.

Application of the *de novo* standard should result in affirmance.

B. LaRose failed to state a hostile work environment claim under the WLAD because LaRose's employer cannot be liable for harassment unless by an employee or independent contractor over whom the employer has control.

LaRose asserts a hostile work environment claim under RCW 49.60. *See* Opening Brief 25.[7] Employers are not liable for harassment by third parties whom the employer cannot control in a master/servant relationship. Ample case law in Washington establishes that an employer's liability for a hostile work environment only exists when the harassment can be imputed to the employer because the harasser is an employee or an independent contractor over whom the employer has maintained some control. The harasser in this case is neither. Dismissal was proper.

The Washington State Supreme Court first established this rule in *Glasgow v. Georgia-Pacific Corp.,* 103 Wn.2d 401 (1985), when it set forth the elements that must be proved to establish a hostile work environment claim under the WLAD. The Supreme Court reiterated this necessary element that the harasser "is an

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[7] LaRose states, "Under Washington law, to establish a prima facie case for a hostile work environment claim, the employee must demonstrate [four elements]." Opening Brief 25. She then proceeds to challenge the Superior Court's dismissal of her "WLAD claim for a hostile work environment," arguing she has met all four elements. *Id*.

employee" of the employer against whom the claim is asserted in its 1996 decision *DeWater v. State*, 130 Wn.2d at 135-40. The Supreme Court allowed that the employee requirement could also be met if the harasser is an independent contractor, but only if the employer maintained some control over that independent contractor. *Id*.

Numerous decisions over the ensuing twenty years have stated and applied these elements, including *Antonius v. King County*, 153 Wn.2d 256, 261 (2004). The Legislature has taken no action to modify the imputation requirement of the WLAD.

Here, the Superior Court correctly applied this settled law to this case when it dismissed the hostile work environment claim where the harasser (Mr. Smith) was not an employee of PDA or an independent contractor of PDA over whom PDA exercised control. As explained in King County's brief, LaRose has never argued that PDA had control over Mr. Smith. This Court should affirm.

1. *Glasgow* and *DeWater* expressly require a plaintiff to show the harasser "is an employee" to state a hostile work environment claim.

DeWater concerned the same claim alleged by LaRose: sex discrimination based on a hostile work environment. Hostile work environment claims require an employee to prove four elements: the

harassment (1) was unwelcome, (2) was because of sex, (3) affected the terms or conditions of employment, and (4) is imputed to the employer. *DeWater*, 130 Wn.2d at 135, citing *Glasgow*, 103 Wn.2d at 406-07. The *DeWater* court focused on the fourth element, imputation. Here, as in *DeWater*, even if the other elements could be established, LaRose's claim fails as a matter of law on the fourth element. The harassment of which she complains cannot be imputed to her employer.

The *DeWater* court, following the test established in *Glasgow*, held a plaintiff can establish imputation one of two ways. First, a plaintiff can show that the harasser has management status, which justifies imputing liability to the employer. *Id*. Thus, "[w]here an owner, manager, partner or corporate officer personally participates in the harassment," the imputation element can be met. *Id*. at 135, citing *Glasgow*, 103 Wn.2d at 407. Alternatively, "[i]n instances where the person harassing the worker is not in management, the employer is not held vicariously liable unless the plaintiff shows that **the person committing the harassment is an employee** and that the employer (a) authorized, knew, or should have known of the harassment and (b) failed to take reasonably prompt and adequate corrective action." *DeWater*, 130 Wn.2d at 135. This formulation

comes directly from *Glasgow*, in which the Court also required that the harasser be an employee. *Glasgow*, 103 Wn.2d at 407. *Glasgow* and *DeWater* both establish that imputation requires that the harasser be either a manager or a co-worker.

LaRose puts her cart before the horse when she discusses the additional requirements necessary to trigger vicarious liability for the acts of a co-worker: that "the employer (a) authorized, knew, or should have known of the harassment and (b) failed to take reasonably prompt and adequate corrective action." *See* Opening Brief 27. She skips the first part of the test that requires the harasser to be an employee, and argues that this Court should only analyze whether she has shown these additional requirements of notice and failure to take remedial action. Opening Brief 27. That analysis is not reached under *Glasgow* and *DeWater*.

LaRose acknowledges that her alleged facts "*would* create liability for a coworker harassment." Opening Brief 27 (emphasis added). The flaw in her case is that such facts are relevant *only if* co-worker harassment is alleged. That is a necessary component to show the fourth element, imputation. LaRose offers no Washington case authority or theory to show that this requirement—established by the Supreme Court in successive decisions expressly stating the

necessary elements for an employer's liability for a hostile work environment claim—is dispensable. It is not. LaRose's claim blatantly fails to satisfy the essential element required by *Glasgow* and *DeWater* that the alleged harasser be an employee.

LaRose argues that "[t]he Trial Court interpreted *DeWater* as standing for the proposition that the only person responsible for the alleged hostile work environment was the non-employee harasser/stalker Client A…." Opening Brief 25. The Superior Court did not "interpret" *DeWater* incorrectly. No interpretation was necessary to hold that to impute liability for a hostile work environment to an employer under the WLAD, the harasser must be an employee. The *Glasgow* and *DeWater* decisions both expressly state this. LaRose simply ignores the express requirement articulated by the Supreme Court in 1985 and again in 1996.

To the extent any analysis is undertaken, LaRose's claim still fails as a matter of law. The *DeWater* Court stressed that analysis of the imputation inquiry concerns the employer's ability to control the harasser. The focus is not on the employer's ability to control the plaintiff. "It is only the status of [the harasser] that determines the State's liability in this case; we therefore do not consider the nature of the relationship that Ms. DeWater had with the State." *Id*. at 132

n.3. The Court was clear: "We hold a foster parent is not an 'employee' of the State for purposes of the law against discrimination, RCW 49.60; therefore, the State is not vicariously liable for the foster parent's alleged acts of harassment." *Id*. at 130. No liability existed despite allegations the State had notice of a prior incident involving the non-employee harasser. *Id*. at 132 n.4.

In LaRose's case, the harasser clearly is not an employee or an independent contractor controlled by PDA. LaRose has never disputed this. This ends the imputation inquiry. This case is more clear-cut than *DeWater*, where the State's relationship with the alleged harasser required scrutiny whether the alleged harasser—a foster parent paid by the State—qualified as an employee. The lack of an employment relationship between PDA and Mr. Smith leaves a fatal hole in LaRose's WLAD claim as a matter of law.

2. Washington appellate courts have consistently applied the *DeWater* decision over the ensuing twenty years.

Numerous appellate cases decided since the Supreme Court issued the *DeWater* decision in 1996 have reiterated its requirements. *See Henningson v. Worldcom, Inc*., 102 Wn. App. 828, 836-44 (2000) (liability could be imputed to an employer for the acts of its employee where the harassing employee made a tangible

employment decision (i.e., a promotion) concerning the plaintiff), *Washington v. Boeing*, 105 Wn. App. 1, 11-12 (2000) (plaintiff established neither the third nor fourth prongs necessary for a hostile work environment claim), *Sangster v. Albertson's, Inc.*, 99 Wn. App. 156, 164-66 (2000) (addressing imputation of a supervisor's conduct).[8] No basis exists for this Court to dispense with the requirement for imputation established by the Supreme Court.

In *Washington v. Boeing*, *supra*, Division One reiterated the requirements of *Glasgow* that liability may be imputed to the employer only where an employee (owner, officer, manager, supervisor or co-worker) created the hostile work environment:

> In *Glasgow v. Georgia-Pacific Corp.*, our Supreme Court held that where **an owner, manager, partner, or corporate officer personally participates in the harassment**, the fourth element is met by proof of management status. Where the person harassing the worker is not in management, the employer is not held responsible for the discriminatory work environment **created by a plaintiff's supervisor or co-worker**. This is subject to the exception that if the employer (1) authorized, knew, or should have known of the harassment and (2) failed to take reasonably prompt and adequate corrective action there can be liability.

105 Wn. App. at 11-12 (emphasis added). These requirements have

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[8] LaRose's reliance on *Bartlett v. Hantover*, 9 Wn. App. 614, 621 (1973), which case relates to tort law and predates both *DeWater* and *Glasgow*, is inapposite. *See* King County's brief at IV.A.3.

not disappeared from or changed in Washington case law.

LaRose argues that the plaintiff in *Antonius v. King County* "prevailed" on a hostile work environment claim based on non-employee conduct, *see* Opening Brief 30, but this is grossly inaccurate. The plaintiff in *Antonius* had not prevailed. The Supreme Court reviewed a certified issue arising from dismissal of the claim on statute of limitations grounds. 153 Wn.2d 256. The Supreme Court reviewed only the timeliness of the claim. *Id*. The allegations included actions by "co-workers and supervisors," as well as some inmates. *See id*. at 269. Nothing about *Antonius* establishes or suggests that inmate conduct alone would be sufficient to establish a claim of hostile work environment under the WLAD. To the contrary, the plaintiff alleged both co-worker and supervisor harassment. *Antonius* does not support LaRose's position that she can impute liability under the WLAD to her employers for acts of a third-party non-employee over whom PDA exercised no control.

3. Federal law applies different principles of direct liability than the WLAD, which is interpreted according to agency and vicarious liability principles.

LaRose asserts that because harassment by a third party is sometimes actionable under Title VII, the same should be true under

the WLAD. Opening Brief 31-33, citing *Beckford v. Dep't of Corrections*, 605 F.3d 951, 957-58 (11th Cir. 2010), citing *Dunn v. Wash. County Hosp*., 429 F.3d 689, 691 (7th Cir. 2005) and *Little v. Windermere Relocation*, 301 F.3d 958, 966 (9th Cir. 2001). The corollary is unsupported. Title VII and federal discrimination cases are not binding authority on a Washington court. Employer liability for hostile work environment under the WLAD rests on different principles and tests than those applied by federal courts.

While Washington courts might aspire to "keep pace with federal law where consistent with our own statute and developing case law," see *Henningson*, 102 Wn. App. at 842, federal statutes, including Title VII, and case law are not binding on this court. *See, e.g.*, *Glasgow*, 103 Wn.2d at 406 n.2. Washington courts only look to non-binding federal precedent when there is not already Washington precedent on point. *Antonius*, 153 Wn.2d at 266, citing *Martini v. Boeing Co*., 137 Wn.2d 357, 372-75 (1999). Where Title VII and WLAD interpretive case law are different, the Supreme Court has expressly declined to find federal authority persuasive. *See, e.g.*, *Antonius*, 153 Wn.2d at 266, citing *Martini v. Boeing Co*., 137 Wn.2d 357, 372-75 (1999). *DeWater* and *Glasgow* are on point and control. No need exists to look to non-binding federal precedent for guidance.

In *DeWater*, the Supreme Court refused to rely on the relationship between the plaintiff-employee and employer as a basis for liability. 130 Wn.2d at 132 n.3. *See also Henningson*, *supra*, 102 Wn. App. at 843 ("[O]ur Supreme Court has subsequently applied agency principles in deciding a case raising a claim of hostile work environment."), citing *DeWater*, 130 Wn.2d at 137-42. This approach contrasts sharply with the federal cases cited by LaRose that do not require the employer to have an employer relationship to the harasser.

Federal decisions recognizing employer liability for acts of third persons follow a different approach than established Washington law, rejecting vicarious liability principles in favor of "direct rather than derivative" liability. See *Dunn v. Wash. County Hosp*., 429 F.3d 689, 690-91 (7th Cir. 2005). In *Dunn*, Judge Esterbook of the Seventh Circuit noted that a defendant would not be liable for hostile work environment under a vicarious liability analysis, admitting, "The proposition about the limits of vicarious liability is incontestable." *Id*. at 690. But the Court rejected vicarious liability as the basis for liability under Title VII, stating that the "[a]bility to 'control' the actor plays no role." *Id*. at 691. Instead, the Court found Title VII imposed direct liability for the employer's own failure

to act. *Id. See also Lockard v. Pizza Hut*, 1623 F.3d 1062 (10th Cir. 1998) (extending Title VII liability to customer harassment on basis that "we agree with those courts that have applied a negligence theory of liability to the harassing acts of customers."). LaRose's attempt to rely on *Little v. Windermere Relocation* also misses the mark because, although it mentions the WLAD as similar to Title VII, the claim in that case was brought in federal court under federal law and so the court applied federal law. *Little v. Windermere*, 301 F.3d 958, 966 (9th Cir. 2001).

Unlike federal courts, our Supreme Court requires that imputation be demonstrated by establishing vicarious liability through agency principles focused on employer control of an employee harasser. This explains the divergence in the federal versus state case law. LaRose chose not to pursue a Title VII claim. LaRose, having elected to sue under the WLAD, must meet its vicarious liability standard. She cannot. The ruling of dismissal was correct.

4. <u>The Legislature has not amended the WLAD to alter the required elements or result of *DeWater*, demonstrating that the imputation requirements reflect legislative intent.</u>

The Supreme Court decided *DeWater* in 1996. The Legislature has since amended RCW 49.60.180(3) two times. See

2007 c 187 § 9; 2006 c 4 § 10; 1997 c 271 § 10; 1993 c 510 § 12. The Legislature has not once modified the requirement that imputation be justified by showing that the harasser "is an employee." The Washington Legislature is presumed to know the requirements of the law as interpreted by Washington courts. *Grp. Health Coop. v. City of Seattle*, 146 Wn. App. 80, 103 (2008), citing *Woodson v. State*, 95 Wn.2d 257, 262 (1980). Had the Legislature intended a different result or wished to expand the circumstances in which the WLAD would impute harassment to an employer, it had every opportunity to amend the WLAD. This Court should presume that *Glasgow* and *DeWater* correctly reflect legislative intent.

The essential element of imputation under the WLAD requires an employer relationship to the alleged harasser. That requirement undisputedly is lacking here. The Superior Court's ruling of dismissal was correct. It should be affirmed.

C. PDA cannot be liable for an allegedly hostile work environment because LaRose presented insufficient facts during the time period when PDA was her employer.

PDA also moved for dismissal on the basis that Plaintiff's allegations with respect to what allegedly occurred while she was employed by PDA are factually insufficient to support a hostile work

environment claim against PDA. *See* CP 1620-24. PDA raised and briefed this ground to the Superior Court, so this Court may consider it. RAP 2.5(a) also allows this Court to affirm upon alternative grounds "if the record has been sufficiently developed to fairly consider the ground." It has. The record shows what LaRose alleges occurred during the time she was employed by PDA up to July 1, 2013. These facts are insufficient as a matter of law to satisfy at least element three or four of a hostile work environment claim against PDA.

To establish the third element of her hostile work environment claim—alteration of the terms of her employment—LaRose was required to establish that she experienced harassment "sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment." *Glasgow*, 103 Wn.2d at 406-07. "To determine whether the harassment is such that it affects the conditions of employment, [courts] consider: the frequency and severity of the discriminatory conduct; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Washington v. Boeing*, 105 Wn. App. 1, 10 (2000). "Casual, isolated or trivial manifestations of a discriminatory

environment do not affect the terms or conditions of employment to a sufficiently significant degree to violate the law." *Id*.

As a matter of law, LaRose failed to allege, or present evidence to show, that she experienced harassment sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment by June 30, 2013. In her original complaint, LaRose did not allege that she complained to PDA or asked PDA to take any action while PDA was her employer. CP 1592-600. All LaRose alleged relevant to PDA was (1) she was assigned to represent Mr. Smith and (2) in April 2013 she told a supervisor "that she ***might*** want him to transfer the case." *Id*. ¶¶ 2.12, 2.19 and 2.24-2.25. Within two days she then said she did not want to be transferred. CP 232-33.

Even after LaRose amended her complaint and after discovery, the record fails to show harassment sufficiently pervasive to alter the conditions of her employment by PDA. LaRose admits that she cannot establish or estimate how many "I love you" calls or voicemails she received from Mr. Smith when she was employed by PDA, and admits that the calls she received while employed by PDA were not of a number or nature that led her to believe she ought to stop representing Mr. Smith. CP 232-33; 202-03; 254. Indeed,

LaRose admits that at all times during her employment by PDA, she was able to continue zealously representing Mr. Smith. CP 202-03.

LaRose also failed to allege or establish facts sufficient to satisfy factor four. Again, in instances where the person harassing the worker is not in management, the harassment is not imputed to the employer unless the plaintiff shows that the person committing the harassment is an employee **and** that the employer (a) authorized, knew, or should have known of the harassment and (b) failed to take reasonably prompt and adequate corrective action. *DeWater*, 130 Wn.2d at 135, citing *Glasgow*, 103 Wn.2d at 407 (emphasis added). In other words, a hostile work environment claim does not arise unless and until the claimant was harassed by a co-worker, the claimant complained about the harassment to her employer, and the employer failed to take sufficient remedial action.

Setting aside for argument's sake the requirement of *DeWater* that the harasser must be an employee, even under the non-binding federal case law, an employer may be found liable for the harassing conduct of a third party only "if the employer fails to take immediate and appropriate corrective action in response to a hostile work environment of which the employer knew or reasonably should have known." Opening Brief 31, quoting *Watson v. Blue Circle, Inc.*, 324

F.3d 1252, 1258 n.2 (11th Cir. 2003). Here, when LaRose told Mr. Goldsmith she thought she needed to get off Mr. Smith's case, Mr. Goldsmith immediately agreed, saying "Okay." CP 177-78. LaRose, however, subsequently changed her mind and declined that remedial action, electing to keep the case until it was finished. CP 197-98. PDA respected LaRose's stated preference that she stay on Mr. Smith's case. PDA previously had immediately granted, with no negative consequences, requests from women lawyers to be removed from other cases. CP 75-76. LaRose cannot establish prong four of her hostile work environment claim against PDA as a matter of law.

These alternative grounds support affirmance of the Superior Court's dismissal of LaRose's hostile work environment claim against PDA.

D. The Industrial Insurance Act bars LaRose's negligence claims because her injury of post-traumatic stress disorder arises from a traumatic event that the Act necessarily covers.

The Superior Court properly dismissed LaRose's Causes of Action A and B in her First Amended Complaint under Rule 56. LaRose's Causes of Action A and B are duplicative negligence claims. In both, LaRose alleges that PDA violated its duty to provide

her a safe workplace, which resulted in Mr. Smith's stalking behavior, which caused her to experience severe emotional distress in the form of PTSD and depression. CP 1910-33 ¶¶ 15:16–17:3. Those claims are barred by Washington's Industrial Insurance Act (IIA) as a matter of law. The Superior Court's dismissal of them should be affirmed.

1. The IIA is LaRose's exclusive remedy with respect to the injuries she alleges were caused by PDA's negligence while it was her employer.

"The IIA immunizes, from judicial jurisdiction, all tort actions which are premised upon the fault of the employer vis-à-vis the employee." *Hatch v. City of Algona*, 140 Wn. App. 752, 757 (2007); *Reese v. Sears*, 107 Wn.2d 563, 571 (1987); RCW 51.04.010. The IIA abolished most tort actions arising from on-the-job injuries and replaced them with "an exclusive workers' compensation system that provided swift and certain recovery for injured employees, regardless of fault." *Vallandigham v. Clover Park Sch. Dist*., 154 Wn.2d 16, 26, (2005); RCW 51.04.010. As a result, under Washington's statutory scheme, an employee may sometimes receive less than full tort damages in exchange for relief from the expense and uncertainty of litigation. *McIndoe v. Dep't of Labor & Indus*., 144 Wn.2d 252 (2001); *Frost v. Dep't of Labor & Indus*., 90 Wn. App. 627, 631 (1998).

An employer may only be held responsible for allegedly negligent acts injuring an employee if the alleged conduct does not give rise to a cognizable IIA claim. *Haubry v. Snow*, 106 Wn. App. 666, 678 (2001). Injuries suffered at the hands of a non-co-worker third-party give rise to a cognizable IIA claim. *See, e.g., Folsom v. Burger King*, 135 Wn.2d 658, 667, 958 P.2d 301 (1998) (summarily dismissing as barred by the IIA a claim against an employer by the estate of employees who were murdered by a former co-worker based on the theory that the employer allegedly knew of the shooter's criminal history, his sexual harassment of females, and that security measures at the restaurant were lacking and might invite theft); *Vallandigham*, 154 Wn.2d at 26. That is what LaRose alleges in this case.

LaRose contends that PDA failed to maintain a safe workplace and, as a result, she experienced psychological harm at the hand of Mr. Smith. That claim is precisely the type covered by the IIA. Indeed, LaRose admitted that her alleged injuries are workplace injuries compensable under the IIA in her deposition. CP 208-11. And she filed a workers' compensation claim against King County for the same injury upon which she bases her claims herein. CP 250.

2. LaRose's alleged psychological harm is an industrial injury under the IIA.

The question of whether a claim for an alleged injury is covered by the IIA and therefore immune from civil suit is a question of law. *Reese*, 107 Wn.2d at 565. "The liberal construction of the IIA necessitates that all doubts be resolved in favor of coverage." *State v. Lyons Enters., Inc*., 185 Wn.2d 721, 733, 374 P.3d 1097 (2016).

LaRose argues that her alleged harm does not qualify as an "injury" under the IIA, apparently because it is psychological in nature. Opening Brief 38-39. That is incorrect. The IIA regulations and case law are explicit that the Act applies to alleged psychological harm, including stress resulting from exposure to a traumatic event. WAC 296-14-300(2); *Sutherland v. Dep't of Labor & Indus*., 4 Wn. App. 333, 335, 481 P.2d 453 (1971) ("emotional stress or strain may be a 'sudden and tangible happening of a traumatic nature' within the meaning of the statute."); *Rothwell,* 173 Wn. App. at 814; *Birklid v. The Boeing Co*., 127 Wn.2d 853, 871-72 (1995). *See Sharpe v. AT&T*, 66 F.3d 1045, 1051–52 (9th Cir. 1995).

In her brief, LaRose confuses and conflates the terms "industrial injury" and "occupational disease." There is a difference. Under the IIA, a worker is entitled to disability benefits for an

industrial injury or an occupational disease. RCW 51.32.010, .180. An industrial injury is "a sudden and tangible happening, of a traumatic nature, producing an immediate or prompt result, and occurring from without, and such physical conditions as result therefrom." RCW 51.08.100. An occupational disease, on the other hand, is a "disease or infection as arises naturally and proximately out of employment." RCW 51.08.140.

In 1988, the Legislature directed the Department of Labor and Industries to adopt rules excluding claims for mental conditions or disabilities caused by stress from the definition of *occupational disease*. *See* RCW 51.08.142; LAWS OF 1988, ch. 161, § 16. The resulting WAC regulation makes clear that while claims "based on mental conditions or mental disabilities caused by stress do not fall within the definition of an *occupational disease*," a mental condition or disability caused by stress that results from "exposure to a single traumatic event" is compensable as an *industrial injury*. WAC 296-14-300 (emphasis added).

Divisions One and Three have confirmed that "unusual emotional stress or strain may be a 'sudden and tangible happening of a traumatic nature' within the meaning of the statute" defining a qualifying industrial injury under the IIA. *Sutherland*, 4 Wn. App. at

335. *See also Rothwell*, 173 Wn. App. at 814 (affirming dismissal of a custodian's claims for intentional and negligent infliction of emotional distress as barred by the IIA arising from her diagnosis of PTSD after cleaning the scene of a student suicide).

LaRose alleges unusual emotional stress and psychological damages stemming from exposure to one or more traumatic event(s) at work by a client. LaRose has not alleged that she suffered general stress resulting from a change of employment duties, disciplinary action, or the stresses of the job. Whether LaRose's psychological condition qualifies for workers' compensation as an occupational disease is irrelevant. Her alleged injuries <u>are</u> a compensable industrial injury as a matter of law.

3. <u>LaRose's alleged psychological harm qualifies as an industrial injury under the IIA because it results from one or more traumatic event within a series.</u>

LaRose argues that the Superior Court should have concluded that the resulting injury falls outside the IIA because she experienced a series of traumatic events, as opposed to just one. That argument is contrary to the law. WAC 296-14-300(2)(d) is explicit that a single traumatic event "that occurs within a series of exposures <u>will</u> be adjudicated as an <u>industrial injury</u>." LaRose has

cited no authority to the contrary in the Superior Court or to this Court.

Each of the events LaRose alleges caused her to develop PTSD and depression was a single traumatic event as defined in subsections (2)(b) and (c) of WAC 296-14-300. LaRose's expert and treating psychiatrists testified that she directly experienced "sudden traumatic event[s]" and that each of those traumatic event was "enough," ***standing alone***, to cause her PTSD. CP 255-57. *See also* CP 246-47. This includes the "stalking type phone calls to her at work beginning in 2013," as well as other subsequent traumatic events that occurred after LaRose was no longer employed by PDA. CP 644-47 ¶¶ 13 and 16-17 and CP 660 ¶ 2.

LaRose has testified that upon receiving Mr. Smith's calls, she felt concerned and lost sleep. CP 544 ¶ 21, 24.[9] She contends that even the calls and messages she received from Mr. Smith during the time she was employed by PDA were notable, fixed as to time and place and susceptible of investigation. LaRose does not, and frankly

[9] That LaRose elected not to seek medical treatment for her stress until a later date is not material. Nor is the fact that the stress was not immediately labeled by a practitioner as PTSD. LaRose cited no authority to support an argument that these facts are material. *See* Opening Brief 39-40.

cannot, disagree that the events she experienced are single traumatic events as defined in subsections (2)(b) and (c).

Each of the traumatic events LaRose alleges caused her harm qualifies as an injury under the IIA, even though there might have been a series of exposures. LaRose's civil suit based upon her industrial injury(ies) is covered by the IIA and, therefore, barred in this Court. It was properly dismissed.

4. LaRose mischaracterizes her action before the BIIA; it does not change the fact that her negligence claims against PDA are foreclosed by the IIA.

LaRose argues that PDA should be "collaterally estopped" by a finding of fact by the Board of Industrial Insurance Appeals (BIIA). Opening Brief 41-44. That argument fails, for a number of reasons. First and foremost, PDA is not a party to that proceeding. LaRose has never filed a workers' compensation claim against PDA. To the extent LaRose intended to argue estoppel against PDA, that argument fails because PDA was not a party to the action. *See McCarthy v. DSHS*, 110 Wn.2d 812, 825 (1988) ("The doctrine of collateral estoppel precludes relitigation of issues once litigated and determined between the parties, even though a different claim or cause of action is asserted.") (emphasis added).

In addition, as explained by King County in its brief, LaRose misconstrues both the doctrine of collateral estoppel and the nature of her IIA adjudication. *See* King County's Response at IV.B.2(b)(ii).

LaRose's estoppel argument backfires. Under *McCarthy*, the IIA's exclusive remedy provision defeats LaRose's civil tort claims. The Superior Court's decision was correct and should be affirmed.

E. The Superior Court properly dismissed LaRose's negligence claims against PDA because the undisputed evidence of record establishes that LaRose cannot prove the essential elements of breach or causation.

The Superior Court properly dismissed LaRose's negligence claims under Rule 56 because the record evidence is inadequate to support the claims' essential elements. In order to establish her negligence claim against PDA, LaRose must prove (1) the existence of a duty, (2) breach of that duty, (3) resulting injury, and (4) proximate cause between the breach and the injury. *See Musci v. Graoch Assocs. Ltd. P'ship #12*, 144 Wn.2d 847, 854 (2001). Her inability to prove any one element is grounds for dismissal of her negligence claim, *Howell v. Blood Bank*, 117 Wn.2d 619, 624 (1991), and since proof of negligence is a prerequisite to establishing a negligent infliction of emotional distress claim, it is also grounds for dismissal of that duplicative claim. *Snyder v. Med. Serv. Corp.*, 98

Wash App 315, 323 (1999).[10] The undisputed evidence demonstrates that LaRose cannot prove that PDA breached any duty it owed her or that any alleged breach by PDA proximately caused damages.

LaRose appears to contend that PDA had a specific duty to decide that no female attorney would be permitted to represent Mr. Smith, even if she stated that she wished to and in the face of prior representations by women lawyers who had represented him without being stalked or harassed. Opening Brief 36. That argument must fail because such a duty would contradict and violate federal and Washington state anti-discrimination laws. *See, e.g.*, Washington's Law Against Discrimination, RCW 49.60.030, and Title VII, 42 U.S.C. § 2000e *et seq*, which invalidated state "protective" laws that limited the kinds of jobs women were allowed to hold. Employers are prohibited from indulging a stereotype that women per se cannot or ought not to do a certain kind of work because it is uniquely dangerous to women. *See, e.g.*, *Int'l Union, United Auto., etc. v.*

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[10] To establish her negligent infliction of emotional distress claim, LaRose would have to prove (1) that PDA's negligent acts injured her, (2) the acts were not a workplace dispute or employee discipline, (3) the injury is not covered by the Industrial Insurance Act, and (4) the dominant feature of the negligence claim was the emotional injury. *Snyder*, 98 Wash App at 323.

Johnson Controls, 499 U.S. 187, 211 (1991) (an employer's policy barring all women except those with documented infertility from jobs involving lead exposure constituted sex discrimination forbidden under Title VII).

PDA acknowledges that, under certain circumstances, an employer has a "duty to make reasonable provision against foreseeable dangers of criminal misconduct to which the employment exposes the employee." *Bartlett v. Hantover*, 9 Wn. App 614, 621 (1973). The precise parameters of that duty are rarely discussed in Washington case law since claims for injury arising from an allegedly unsafe workplace are dealt with under the no-fault workers' compensation system. However, there is no evidence in the record to establish or raise a genuine issue of material fact that PDA failed to make reasonable provision against a foreseeable danger of criminal misconduct to LaRose.

LaRose's negligence theory is based entirely on a false premise supported by no evidence. It is undisputed that at the time Mr. Smith's case was assigned to LaRose, PDA had no reason to foresee that Mr. Smith would harass or stalk her. He had never before done either of those things to a female or male public

defender who represented him. CP 2664-68.[11] At least two female attorneys represented Mr. Smith before LaRose represented him and—despite LaRose's attempts to *argue* otherwise—Mr. Smith did not harass or stalk either of them. CP 2668 ¶ 3 and 2664 ¶ 2. And, as soon as LaRose informed PDA that Mr. Smith had begun making calls she considered inappropriate and would not stop, PDA immediately agreed to reassign the case, but LaRose expressed that she preferred to keep it. CP 177, 197-98.

Even if PDA were held to the standard LaRose urges, requiring it to overrule LaRose's decision and remove her from Mr. Smith's case based upon her gender once it had notice of the inappropriate phone calls, there is no evidence that reassigning the case at that point would have changed Mr. Smith's subsequent acts. LaRose admitted in her deposition that she does not have any way of knowing whether, if she had withdrawn from Mr. Smith's case in May 2013, that would have stopped him from continuing to contact her in the future. CP 187. LaRose's psychiatric expert agreed; he admitted there is no way to determine whether reassignment away

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[11] LaRose cannot rebut Ms. Lederer's undisputed testimony that Mr. Smith never harassed or stalked her because LaRose admits she has no first-hand knowledge of any of the communications between Ms. Lederer and Mr. Smith. CP 205.

from LaRose could have prevented Mr. Smith from stalking her. CP 245. Even if LaRose could establish that PDA breached a duty by failing to take Mr. Smith's case away from her based on her gender despite her preference to keep it, her theory of causation is speculative at best. "A claim of liability resting only on a speculative theory will not survive summary judgment." *Marshall v. Bally's Pacwest, Inc.*, 94 Wn. App. 372, 381 (1999).

The record evidence is insufficient to establish or raise a genuine issue of material fact that anything PDA did breached its duty to LaRose or proximately caused the injuries she alleges. LaRose's negligence claims against PDA fail as a matter of law.

F. No issues of fact prevented the summary judgment dismissal of LaRose's intentional injury claim.

LaRose's Cause of Action F in the Amended Complaint is an argument that her negligence claim should be exempt from the IIA under the "deliberate, intentional injury" exception set forth in RCW 51.24.020. Under RCW 51.24.020, an employee may sue her employer for a workplace injury if the employee-plaintiff can prove the "injury results to a worker from the deliberate intention of his or her employer to produce such injury." The record is devoid of evidence by which LaRose could establish the narrowly construed

"deliberate intention" exception. LaRose's "deliberate intention" claim against PDA was properly dismissed.

The Supreme Court has held that "deliberate intention" is limited to those incidents where it can be proven the employer had actual knowledge that injury is **certain to occur** and willfully disregards that knowledge. *Birklid v. Boeing Co*., 127 Wn.2d 853, 865. (emphasis added) The Court also has elaborated that "[i]n addressing this statutory exception, Washington courts have interpreted the exception narrowly and have found 'deliberate intention' typically when there is a physical assault by one worker against another." *Folsom v. Burger King*, 135 Wn.2d 658, 666 (1998). "Washington courts have required a specific intent to injure in order to sustain a claim under RCW 51.24.020. Mere negligence does not rise to the level of deliberate intention." *Id.* at 664-65.

In *Folsom*, a former employee broke into a Burger King restaurant to rob it and murdered two workers. When the estates of the murdered workers sued the employer, asserting the deliberate intention exemption to the IIA, the *Folsom* Court held that, even though the employer-defendant may have been aware of facts that one might argue created foreseeability of the future crime, "the statutory exception to employer immunity as discussed in *Birklid*

requires more." *Id*. at 667.

No evidence shows that PDA had actual knowledge that LaRose's alleged injury was certain to occur at the hands of Mr. Smith. There is no evidence that Mr. Smith had previously harassed or stalked a female attorney. He had been represented by at least two other female attorneys at PDA, and he made no inappropriate comments toward Ms. Thomas and engaged in no behavior toward Ms. Lederer that she considered to be harassing or stalking or that persisted after she told him to stop. CP 2664, 2667.

Nor is there evidence that PDA "willfully disregarded" any such knowledge or intended LaRose to suffer harm. LaRose admitted in her deposition that she has no knowledge or evidence that PDA accepted Mr. Smith's case, assigned Mr. Smith's case to her, or supported her decision to remain on Mr. Smith's case with the intent to put her at risk. CP 228-29.

LaRose attempts to dodge that essential issue by arguing negligence and that Mr. Smith's stalking was foreseeable to PDA. Those arguments are unsupported by the record and, more importantly, neither negligence nor foreseeability is legally sufficient for the exception to apply. The Supreme Court has made clear: "An inquiry into the reasonableness or effectiveness of an employer's

remedial measures sounds in negligence, and we reject any notion that a reasonableness or negligence standard can be applied to determine whether an employer has acted with willful disregard." *Vallandigham v. Clover Park Sch. Dist.*, 154 Wn.2d 16, 19 (2005).

LaRose's effort to rely on *Michelbrink v. Wash. State Patrol* is misplaced. In *Michelbrink*, this Court affirmed denial of summary judgment based on a finding that being deliberately shot with a Taser at the workplace as part of training might be found to fall within the deliberate intention exception to the IIA. *Michelbrink* v. Wash. State Patrol, 191 Wn. App. 414, 419-20 (2015). There, the employer intentionally shot Michelbrink with a Taser, with specific intent to injure him, so he could experience the feeling. The facts in this case do not match those in *Michelbrink*.

LaRose failed to establish or raise a genuine issue of material fact as to whether PDA had actual knowledge her alleged injury was certain to occur at the hands of Mr. Smith. Accordingly, her *Birklid*/"deliberate intention" claim was properly dismissed.

The IIA immunity rule applies to LaRose's tort claims against PDA. The narrow "deliberate intention" exception does not. The Superior Court's decision dismissing Claim F should be affirmed.

G. LaRose failed to state a claim for disability discrimination because she never alleged that she reported a disability to PDA or that PDA discriminated against her on the basis of any alleged disability.

The Superior Court dismissed LaRose's disability discrimination claim (which was asserted as only a failure to accommodate claim) under Rule 12(b)(6), not on summary judgment when it dismissed that claim against King County. This was proper. LaRose did not allege that she disclosed to PDA that she had any disability, including PTSD, at any time while she was employed by PDA, or that she asked for an accommodation of a disability while she was employed at PDA. See CP 1592-600, 1910-33, 2032-33. An employee "must have put the employer on notice of the existence of an impairment, and medical documentation must establish a reasonable likelihood that engaging in job functions without an accommodation would aggravate the impairment to the extent that it would create a substantially limiting effect." RCW 49.60.040(7)(d)(ii). It is undisputed that the first time LaRose requested an accommodation for a medical condition was in March 2015, when she asked the *County*, then her employer, for temporary leave, which accommodation was granted. CP 2460-61.

LaRose failed to state a claim. The disability accommodation

claim against PDA was properly dismissed under 12(b)(6).

H. LaRose may not raise new issues or theories of liability against PDA for the first time in this appeal.

PDA objects to new issues raised or tangentially mentioned by LaRose for the first time in her Opening Brief. The Court should refuse to review any claim or issue that LaRose did not raise in the Superior Court. RAP 2.5(a). When reviewing the Superior Court's order granting summary judgment dismissal of LaRose's claims against PDA, this Court should consider only evidence presented to the trial court. *Rothwell*, 73 Wn. App. at 818, citing *Lybbert*, 141 Wn.2d at 34. Unconsidered evidence may not be presented for the first time on appeal.

LaRose now contends, for example, that at some unspecified point in time "she became more aware of the level of sexual and offensive comments by supervisors and some attorneys in the Felony Division." Opening Brief 20-21. LaRose never made any mention of this in her Complaint, her Amended Complaint, or discovery. CP 1592-600, 1910-33. She cites to a declaration she filed on August 10, 2017. CP 1282. That declaration is not part of the record on summary judgment. LaRose filed it after her response to Respondents' motions for summary judgment, to accompany an

untimely motion for reconsideration the Superior Court denied. CP 438. It was not considered by the Superior Court. CP 2989-91.

Larose appears to argue also for the first time that PDA could somehow be liable for disability discrimination under multiple theories. Opening Brief 50-56. LaRose's theories of "hostile work environment discrimination" and "different treatment discrimination" based on an alleged disability are brand new claims never raised below that cannot be raised for the first time now. The only disability discrimination claim she did raise, an alleged failure to accommodate, was dismissed under CR 12(b)(6), as discussed in the preceding section.

LaRose tries hard to blur Respondents into a single, indivisible entity, in an effort to obscure her lack of evidence. They are not. The Superior Court properly dismissed LaRose's claims against PDA. Those decisions should be affirmed.

V. CONCLUSION

LaRose went through a frightening, awful experience at the hands of a former client, something about which her former employers at PDA feel sorrow and compassion. Employees cannot, however, sue employers for a workplace injury or harassment by a non-employee third party. PDA is not legally responsible for these

events under applicable law.

This Court should affirm.

Dated: February 1, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of February, 2018, I served the foregoing **BRIEF OF RESPONDENT PUBLIC DEFENDER ASSOCIATION** on the following parties and/or counsel of record via *Electronic Court E-Service* as follows:

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